Abdullah bin Osman v M Asojan & Ors

HIGH COURT (JOHOR BAHRU) — ELECTION PETITION NO 26PP-1–06 OF 2013
HASNAH HASHIM J
30 AUGUST 2013

Election — Petition — Petition to set aside election — Whether petition suffered from fundamental flaws and had to be struck out — Whether service of petition failed to comply with r 15(1) of the Election Petition Rules 1954 ('EPR') — Whether material particulars not pleaded to show why election should be avoided under s 32 of the Election Offences Act 1954 — Whether rr 4(1)(b) and 4(4) of the EPR as to pleading of material facts and grounds not complied with — Whether petitioner failed to show how alleged non-compliance with any written law relating to conduct of elections affected result of election

The first respondent was declared as the winning candidate for the Gambir State Constitutency in Johor in the 2013 General Election. In the instant election petition, the petitioner sought to declare the Gambir State Election void and to also declare that the first respondent was not the elected candidate for that seat. The respondents raised the following preliminary objections to the petition: (i) that it was not served in compliance with r 15(1) of the Election Petition Rules 1954 ('EPR'); (ii) that it failed to state the facts and grounds to sustain the prayers sought as was required by rr 4(1)(b) and 4(4) of the EPR; and (iii) that the facts pleaded in the petition were insufficient to sustain the prayer that the result of the election was affected by the second and third respondents' alleged non-compliance with the provisions of written laws relating to the conduct of elections.

Held, striking out the petition and declaring the first respondent as the duly elected candidate for the Gambir State Constituency:

(1) Rule 15(1) of the EPR clearly provided that the notice of presentation of a petition accompanied with a copy of the petition must be served by the petitioner or, if the petitioner had appointed an advocate pursuant to r 9 of the EPR, by that advocate. In the instant case, the service was performed by an advocate not on the petitioner's instruction but on the instruction of another law firm. This did not comply with r 15(1) and on this ground alone the petition was flawed and had to be struck out as against the first respondent (see paras 8–9).

(2) The petitioner contended that the presiding officer breached s 4(a) of the EOA when he signed Form 14 (the statement of the poll after counting the ballots) while having reasonable cause to believe the statements in

Form 14 were false and that such a breach had affected the result of the election. The petitioner failed to state the material facts and grounds with regard to the purported falsification of the numbers of votes in Form 14 to sustain the prayers sought. Merely stating the figures and setting out mathematically the calculations of the votes was insufficient to show that the statements in Form 14 had been falsified. The petitioner had not complied with the requirement of rr 4(1)(b) and 4(4) of the EPR and the failure to plead material facts was a fundamental flaw. A petition must not only narrate the facts complained of but must also relate or associate the complaints with the provisions of election laws alleged to have been transgressed (see paras 12, 38 & 44).

(3) The petitioner was required to plead material facts with particulars where necessary to show on the face of the petition that he had cause to complain with respect to one of the five provisions of s 32 of the EOA before his case could be examined on the merits. The instant petition embarked on a mathematical journey without any specific point of destination. The petitioner seemed to be disputing the total number of ballot papers to be accounted for in the ballot box but there was no substantial dispute as to the number of votes by the electors for each contesting candidate. The facts pleaded were insufficient to sustain the prayer that the alleged non-compliance had affected the result of the election (see para 44).

[Bahasa Malaysia summary

Responden pertama diisytiharkan sebagai calon yang menang untuk Kawasan Negeri Gambir di Johor pada Pilihan Raya Umum tahun 2013. Dalam petisyen pilihan raya ini, pempetisyen memohon untuk mengisytihar Pilihan Raya Negeri Gambir batal dan juga untuk mengisytiharkan bahawa responden pertama bukan calon yang dipilih untuk kerusi tersebut. Responden-responden membangkitkan bantahan awalan berikut kepada petisyen tersebut: (i) bahawa ia tidak diserahkan dalam mematuhi dengan k 15(1) Kaedah-Kaedah Petisyen Pilihanraya 1954 ('KPP'); (ii) bahawa ia gagal untuk menyatakan fakta dan alasan-alasan untuk mengekalkan permohonan yang dipohon seperti yang dikehendaki kk 4(1)(b) dan 4(4) KPP; dan (iii) bahawa fakta yang diplid dalam petisyen tidak mencukupi untuk mengekalkan permohonan bahawa keputusan pilihan raya adalah terjejas oleh ketidakpatuhan responden-responden kedua dan ketiga dengan peruntukan undang-undnag bertulis berkaitan kepada pengendalian pilihan raya.

Diputuskan, membatalkan petisyen dan mengisytiharkan responden pertama calon yang dipilih dengan wajar untuk Kawasan Pilihan Raya Negeri Gambir:

(1) Kaedah 15(1) KPP jelas memperuntukkan bahawa notis penyerahan petisyen disertakan dengan salinan petisyen mesti diserahkan oleh pempetisyen atau, jika pempetisyen telah melantik peguambela menurut

k 9 KPP, oleh peguambela tersebut. Dalam kes ini, penyerahan yang dilakukan oleh peguambela bukan atas arahan pempetisyen tetapi atas arahan firma undang-undang satu lagi. Ini tidak mematuhi k 15(1) dan atas alasan ini saja petisyen adalah cacat dan terpaksa dibatalkan terhadap responden pertama (lihat perenggan 8–9).

(2) Pempetisyen berhujah bahawa ketua pegawai tempat pengundi memungkiri s 4(a) EOA apabila dia menandatangani Borang 14 (pernyataan pilihan raya selepas mengira undi) sementara mempunyai sebab munasabah untuk mempercayai pernyataan dalam Borang 14 adalah palsu dan bahawa kemungkiran sedemikian telah menjejaskan keputusan pilihan raya. Pempetisyen gagal untuk menyatakan fakta material dan alasan berkaitan kepada pemalsuan yang dimaksudkan terhadap nombor undian dalam Borang 14 untuk mengekalkan permohonan yang dipohon. Dengan hanya menyatakan jumlah dan menetapkan secara matematik pengiraan undian adalah tidak mencukupi untuk menunjukkan bahawa pernyataan dalam Borang 14 telah dipalsukan. Pempetisyen tidak mematuhi dengan kehendak kk 4(1)(b) dan 4(4) KPP dan kegagalan untuk memplid fakta material dan adalah kecacatan asas. Suatu petisyen bukan saja mesti menjelaskan fakta yang diadukan tetapi mesti juga berkaitan atau mengaitkan aduan dengan peruntukan undang-undang pilihan raya yang didakwa telah dimungkiri (lihat perenggan 12, 38 & 44).

(3) Pempetisyen dikehendaki untuk memplid fakta material dengan butiran di mana perlu untuk menunjukkan dipermulaan petisyen bahawa dia ada sebab untuk membuat aduan berkaitan kepada satu daripada lima peruntukan s 32 EOA sebelum kes boleh diperiksa bemerit. Petisyen ini bermula atas perjalanan yang ketat tanpa apa-apa poin spesifik tempat tujuan. Pempetisyen jelas mempertikaikan keseluruhan nombor kertas undi untuk dikira dalam kotak undi tetapi tidak terdapat pertikaian yang substansial terhadap nombor undian oleh pemilih-pemilih untuk setiap calon yang bertanding. Fakta yang diplidkan adalah tidak mencukupi untuk mengekalkan permohonan bahawa ketidakpatuhan telah menjejaskan keputusan pilihan raya (lihat perenggan 44).]]]]]]

Notes

For cases on petition to set aside election, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2230–2232.

Cases referred to

Bong Geok Beng v Ahmad Nordin bin Mohamed Amin & Anor [1980] 1 MLJ 167; [1978] 1 LNS 18 (refd)

Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya Zainal Abidin bin Azim & Ors [2005] 3 MLJ 193; [2005] 2 CLJ 237, FC (refd)

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729, FC (refd)

Hardwari Lal v Kanwal Singh AIR 1972 SC 520, SC (refd)
Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors [2009] 5 MLJ 153; [2009] 4 CLJ 488, FC (refd)
Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin Raja bin Hj Omar & Ors [2009] 3 MLJ 589; [2009] 1 LNS 129, FC (refd)
Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)
Patau Rubis v Patrick Uren & Anor [1984] 1 CLJ 51, HC (refd)
Tan Sri Joseph Kurup v Danny Anthony Andipai [2009] 3 MLJ 1; [2009] 3 CLJ 523, FC (refd)
Tengku Korish v Muhamad bin Jusoh & Anor; Abdul Raouf v Ibrahim bin Arshad & Anor; Mokhtar bin Abdullah v Mokhtar bin Haji Daud & Anor [1970] 1 MLJ 6; [1969] 1 LNS 189 (refd)
Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor; Daud bin Wan Jusoh v Anwar bin Haji Musa & Anor; Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor [1988] 2 MLJ 384; [1987] 1 LNS 68 (refd)
Wan Sagar bin Wan Embong v Mohamed Hj Ali & Ors [1988] 2 MLJ 384 (refd)
Wan Sagar Wan Embong v Harun Taib [2008] 6 MLJ 473; [2009] 1 CLJ 457, FC (refd)

Legislation referred to

Elections (Conduct of Elections) Regulations 1981 reg 25(12)(b), Form 14, items A, B
Elections (Postal Voting) Regulations 2003
Election Offences Act 1954 ss 4, 4(a), 6, 32(b), 34(a), 36, 36(1), 42(1)
Election Petition Rules 1954 rr 4(a), 4(1), 4(1)(b), (4), 15(1)
Elections Act 1958 s 16

Nasar Khan bin Mirbas Khan (Mohd Fikah Sanusi, Zulqarnain Lukman, Mohd Zambri and Rohana bt Ramli with him) (Haida Mohd Fikah & Partners) for the petitioner.
Syed Faisal bin Syed Abdullah (Mohamad Reza bin Abu Hassan with him) (Syed Faisal & Co) for the first respondent.
Asliza bt Ali (Mariam Hasanah, Rani Subssandran, Munahyza bt Mustafa and Fajrul Shihar bin Abu Samah with her) (Senior Federal Counsel, Attorney General's Chambers) for the second and third respondents.

Hasnah Hashim J:

THE ELECTION PETITION

[1] This election petition arises from the 13th General Election held on 5 May 2013 ('the said elections'). The petitioner, Abdullah bin Osman, is a registered voter who voted in the state constituency of N09 Gambir in the said

elections. In the said election the first respondent, M Asojan, was declared the winner with a majority vote of 310 votes.

[2] Subsequently on 10 June 2013 the petitioner filed the petition pursuant to s 34(a) of the Election Offences Act 1954 ('the EOA') praying for the following:

(a) a declaration that the election of the state constituency of N09 Gambir, Johor held on 5 May 2013 is void;

(b) a declaration that the first respondent, M Asojan, was not duly elected or ought not to have been returned;

(c) determination and directions pursuant to s 36 of the EOA;

(d) costs; and

(e) any other further order or other reliefs as the court deems just.

THE PRELIMINARY OBJECTIONS

[3] The first, second and third respondents raised the following preliminary objections:

(1) the non-compliance of r 15(1) of the Election Petition Rules 1954 ('the EPR') in respect of the method and manner of service of the election petition;

(2) the non-compliance of the mandatory provisions of r 4(1)(b) and r 4(4) of the EPR requiring the petition to state the facts and grounds to sustain the prayers sought; and

(3) the non-compliance with the mandatory provisions of r 4(1)(b) EPR. The facts pleaded are insufficient to sustain the prayer that the alleged non-compliance have affected the result of the election.

The law

[4] The procedures and conduct of election as well as election petition are mainly governed by the following statutes:

(a) The Election Offences Act 1954 ('the EOA');

(b) The Election Petition Rules 1954 ('the EPR'). This rules is made pursuant to s 42(1) of the EOA;

(c) Elections Act 1958;

(d) The Elections (Conduct of Elections) Regulations 1981 ('the ECER'). This regulations is made pursuant to s 16 of the Elections Act 1958;

(e) Elections (Postal Voting) Regulations 2003. This regulations is made pursuant to s 16 of the said Elections Act; and

(f) Elections (Registration of Electors) Regulations 2002. This regulations is made pursuant to s 15 of the said Election Act.

[5] Justice Azahar Mohamed J, (as he then was) in *Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363 at p 378; [2010] 8 CLJ 608 at p 619 said:

> The first thing that one should know and clearly understand is that the jurisdiction of the election judge to hear election petition is a creature of statute and the judge is especially bound strictly within the letters of the election laws (see: *Mahari Endut v Dato' Hj Mat Razali Kassim* [2009] 5 MLJ 153; [2009] 4 CLJ 488; [2009] 1 LNS 449). In the same vein, just as the election court is bound by the election laws, so too the petitioner in any election petition must strictly adhered to and obeyed all the requirements of the election laws. And in this regard, even in the area of Public Law litigation, the audi alteram partem rule, or the rule requiring fair hearing is of central importance. A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the sine qua non of the right of hearing (see Administrative Law of Malaysia and Singapore (3rd Ed) by Professor MP Jain at p 291).

1. The non-compliance of r 15(1) of the EPR

[6] It is the submission of learned counsel for the first respondent that the person who had performed the service was not the petitioner as required under r 15 of the EPR but was filed and served by a law firm and not the advocate of the petitioner.

[7] According to the affidavit of service (encl 10) the petition was served on the first respondent by Firdaus Mohd, an advocate practicing with the firm of solicitors, known as Messrs Izzaudin, Firdaus and Mahendran. However, in para 3 of the same affidavit he states:

> Saya telah diarahkan oleh Tetuan Haida Mohd Fikah & Partners untuk menyampaikan sesalinan Notis Petisyen Pilihan Raya, Petisyen Pilihan Raya dan Resit yang ketiga-ketiganya bertarikh 10.6.2013 sebagai serahan kepada Responden Pertama dan Responden Kedua (selepas ini ditandakan sebagai eksibit 'FM-1').

Rule 15(1) of the EPR provides:

> Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner:

(a) On the respondent personally which shall be effected by delivering the notice and a copy of the petition to the respondent;

(b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or

(c) by posting a notice on the notice board of the High Court in the State in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any other newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the notice of presentation of the petition and a copy of the petition may be obtained by the respondent free of charge on application at the office of the Registrar.

[8] Rule 15(1) of the EPR clearly provides that the notice of presentation of a petition accompanied with a copy of the petition must be served by none other than the petitioner. However, if the petitioner has appointed an advocate pursuant to r 9 of the EPR then the notice of presentation together with a copy of the petition can be duly served on the respondent by the advocate so appointed. In the petition before this court the service of the said notice as well as the copy of the petition was performed by the advocate not on the instruction of the petitioner himself, but on the instruction of another firm of solicitors, Messrs Haida, Mohd Fikah & Partners. This is therefore a non-compliance of r 15(1) of the EPR as the law is clear and precise that service of such notice must be by the petitioner.

[9] Therefore premised on this ground alone the election petition is obviously flawed and should be struck out and dismissed as against the first respondent. However, I would also like to proceed on the other preliminary objections argued before me.

2. The petitioner has failed to comply with the mandatory provisions of r 4(1)(b) and r 4(4) of the EPR requiring the petition to state the facts and grounds to sustain the prayers sought.

[10] Rule 4(1) of the EPR provides as follows:

(1) An election petition shall contain the following statements;

(a) it shall state the right of the petitioner to petition within section 34 of the Act; and

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer".

[11] Rule 4(4) provides that the following form, or one to the like effect, shall be sufficient:

IN THE HIGH COURT OF.....

THE ELECTION OFFENCES ACT 1954

Election for ..... (state the constituency or electoral ward) holden on the ..... day of ..... 20..... The petition of A., of ..... (or of A., of ..... and B., of ..... , as the case may be) whose names are subscribed.

(1) Your petitioner A. is a person who voted (or had a right to vote, as the case may be) at the above election (or claims to have had a right to be returned at the above election or was a candidate at the above election), and your petitioner B. (here state in like manner the right of each petitioner);

(2) And your petitioners state that the election was held on the ..... day of ..... 20 ..... when A.B., CD., and E.F. were candidates, and the Returning Officer has returned A.B. as being duly elected.

(3) And your petitioners say that (here state the concise facts and grounds on which the petitioners rely). Where for your petitioners pray that it might be determined that the said A.B. was not duly elected or returned, and that the election was void (or that the said E.F. was duly elected and ought to have been returned) ... .

In paras 4, 5 and 6 of his petition the petitioner states as follows,

... Dalam menjalankan pilihan raya tersebut, Ketua-ketua Tempat Mengundi Responden Ketiga di beberapa saluran mengundi di dalam Bahagian Piihan Raya N09 Gambir, dalam memperakui jumlah undian yang diperolehi oleh setiap calon, telah membuat Penyata Pengundian dalam Borang 14, dalam Jadual Pertama, seperti yang dikehendaki di bawah peraturan 25(12)(b) Peraturan-peraturan Pilihan Raya (Perjalanan Pilihan Raya) 1981, yang dia ada sebab yang munasabah untuk mempercayainya sebagai palsu.

Ketidakpatuhan tersebut telah bercanggah dengan s 4(a) Akta Kesalahan Pilihan Raya 1954 dan ketidakpatuhan tersebut itu telah menyentuh keputusan pilihan raya tersebut sepertimana yang dinyatakan di bawah s 32(b) Akta Kesalahan Pilihanraya 1954.

[12] It is the contention of the petitioner that the presiding officer: **A**

(a) had certified the total votes of each candidate as required pursuant to reg 25(12)(b) of the Elections (Conduct of Elections) Regulations 1981 (ECER);

(b) prepared the statement of poll after counting the ballots as prescribed in Form 14 as required by reg 25(12)(b) of the ECER; and **B**

(c) had reasonable cause to believe that the Form 14 is false.

[13] It is the submission of learned counsel for the petitioner that this transgression is a breach of s 4(a) of the EOA and as a result affected the results of the election as provided under s 32(b) of the same Act. **C**

[14] Section 4 of the EOA is the provision for offences by election officers and reads as follows: **D**

> Any officer, clerk, interpreter or other person having any duty to perform pursuant to any written law relating to any election who:
>
> (a) makes, in any record, return or other document which he is required to keep or make under such written law, any entry which he knows or has reasonable cause to believe to be false, or does not believe to be true; **E**
>
> (b) permits any person whom he knows or has reasonable cause to believe not to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons;
>
> (c) refuses to permit any person whom he knows or has reasonable cause to believe to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons; **F**
>
> (d) wilfully prevents any person from voting at the polling station at which he knows or has reasonable cause to believe such person is entitled to vote; **G**
>
> (e) wilfully rejects or refuses to count any ballot paper which he knows or has reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;
>
> (f) wilfully counts any ballot paper as being cast for any candidate, which he knows or has reasonable cause to believe was not validly cast for such candidate; or **H**
>
> (g) is without reasonable cause guilty of any act or omission in breach of his official duty,
>
> shall be liable, on conviction, to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand ringgit or to both such imprisonment and fine and, subject to any specific provision to the contrary in any written law relating to any election, shall until the expiration of five years from such conviction be incapable of being registered or listed as an elector or of voting at any election or of **I**

being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction.

[15] A prosecution of offence under this s 4 can only be instituted with the sanction the public prosecutor (re: s 6 of the EOA). Section 32 of the EOA however deals with the grounds for the avoidance of election on an election petition:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or
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> (e) that the candidate was at the time of his election a person disqualified for election.

[16] The requirement as provided in s 32(b) of the EOA must be strictly adhered to. It is incumbent on the petitioner to plead in his election petition that there was non-compliance with the provisions of any written law relating to the conduct of any election and that such non-compliance had affected the result of the election (re: *Tan Sri Joseph Kurup v Danny Anthony Andipai* [2009] 3 MLJ 1; [2009] 3 CLJ 523).

[17] Justice Alauddin Mohd Sheriff FCJ (as he then was), in delivering the judgment of the Federal Court case of *Dato' Ismail Kamus v Pegawai Pengurus Pilihan Raya (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237, opined on s 32(b) of the Act at p 194 (MLJ); p 245 (CLJ) as follows:

> The provision clearly places the burden on the appellant to prove to the satisfaction of the election judge that:
>
> (i) there has been non-compliance with the provision of the written law relating to the conduct of the elections; and

(ii) the said non-compliance has affected the result of the elections. There is no doubt in our minds that the two limbs in s 32(b) are to be read conjunctively and not disjunctively.

[18] Justice Wan Yahya in *Bong Geok Beng v Ahmad Nordin bin Mohamed Amin & Anor* [1980] 1 MLJ 167; [1978] 1 LNS 18 had this to say:

> Section 32 of the Election Offences Act, 1954, requires the petitioner not only to state specifically in his petition which provisions of the law on which non-compliance is alleged to have taken place but also to supply adequate information as to how the respondent is said to have offended that law. In these cases the petitions were defective for want of specific charges.

[19] The Federal Court in the case of *Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153; [2009] 4 CLJ 488 held that:

> In election cases the principles on pleadings are well settled. Strict compliance with the provisions of the Act 5, regulations and/or Rules is required otherwise any election petition would be rendered defective and liable to be struck out in limine. Thus, under r 4(1)(b) of the Election Petition Rules 1954 ('the Petition Rules 1954') it is mandatory that an election petition shall state briefly the facts and grounds relied upon to sustain the prayers sought for. The rationale for this strict requirement is that the 'the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *The berge v Laudry* [1876] 2 App Cas 102, *Goonesinha v Hon CI de Kretser* [1945] AC 63 or what is said in *Arzu v Arthur* [1965] WLR 675 as a peculiar jurisdiction).

[20] Raja Azlan Shah J (as His Royal Highness then was) in *Tengku Korish v Muhamad bin Jusoh & Anor; Abdul Raouf v Ibrahim bin Arshad & Anor; Mokhtar bin Abdullah v Mokhtar bin Haji Daud & Anor* [1970] 1 MLJ 6; [1969] 1 LNS 189 in his judgment said:

> The Election Offences Act 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of. Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Co v Hawkesford* 6 CB (NS) 336; 141 ER 486, 495 in the following passage:
>
> > There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz where a liability not existing at common law is created by a statute which at the

A same time gives a special and particular remedy for enforcing it ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

B **[21]** It is submitted by learned counsel for the petitioner that since the presiding officer signed the Form 14 with reasonable cause to believe that such statement is false it is therefore an offence pursuant to the section mentioned above. It is further submitted that such a non-compliance of a written law relating to the conduct of the election falls within the provision of s 32(b) of the C EOA.

[22] Learned counsel for the petitioner submitted that the exact non-compliance with s 4(a) of the EOA relates to the total number of votes D obtained by each candidate. The facts pleaded are in relation to item B of Form 14. The petition went on to state the 'Butiran Fakta' in para 4 as follows:

(i) Pada 5.5.2013, Ketua Tempat Mengundi Responden Ketiga di Tempat Mengundi Saluran 4, Pusat Mengundi SMK Bukit Gambir, No Kod Daerah Mengundi 144/09/07 dalam memperakui sesalinan Penyata E Pengundian Selepas Pengiraan Undi (Borang 14) di pusat mengundi tersebut telah membuat penyata bahawa terdapat sebanyak 559 jumlah undian oleh pemilih dan 7 jumlah kertas undi yang ditolak dan 1 kertas undi yang dikeluarkan kepada pengundi tetapi tidak dimasukkan ke dalam peti undi.

F Ketua Tempat Mengundi Responden Ketiga tersebut bagaimanapun hanya merekodkan hanya 566 sahaja jumlah kertas undi yang diambilkira atau yang patut berada di dalam peti undi di tempat mengundi saluran 4 tersebut.

G Berdasarkan hal tersebut Borang 14 tersebut adalah satu penyata palsu dan penyata palsu tersebut telah menyebabkan wujud keraguan yang munasabah terhadap keseluruhan 566 kertas undi di tempat mengundi saluran tersebut.

(ii) Pada 5.5.2013, Ketua Tempat Mengundi Responden Ketiga di H Tempat Mengundi Saluran 4, Pusat Mengundi Sengkang, Kod Daerah Mengundi 144/09/05, Bahagian Pilihan Raya N 09 Gambir, dalam memperakui sesalinan Penyata Pengundian Selepas Pengiraan Undi (Borang 14) di pusat mengundi tersebut telah membuat penyata bahawa terdapat sebanyak 414 jumlah undian oleh pemilih dan 6 jumlah kertas undi yang ditolak dan 0 kertas undi yang dikeluarkan kepada pengundi I tetapi tidak dimasukkan ke dalam peti undi.

Ketua Tempat Mengundi Responden Ketiga tersebut bagaimanapun hanya merekodkan hanya 414 sahaja jumlah kertas undi yang diambilkira atau yang patut berada di dalam peti undi di tempat mengundi saluran 4 tersebut.

Berdasarkan hal tersebut Borang 14 tersebut adalah satu penyata palsu dan penyata palsu tersebut telah menyebabkan wujud keraguan yang munasabah terhadap keseluruhan 594 kertas undi di tempat mengundi saluran tersebut.

(iii) Pada 5.5.2013, Ketua Tempat Mengundi Responden Ketiga di Tempat Mengundi Saluran 4, Pusat Mengundi Sekolah Agama Bukit Gambir, Kod Daerah Mengundi 144/09/15, Bahagian Pilihan Raya N 09 Gambir, dalam memperakui sesalinan Penyata Pengundian Selepas Pengiraan Undi (Borang 14) di pusat mengundi tersebut telah membuat penyata bahawa terdapat sebanyak 431 jumlah undian oleh pemilih dan 14 jumlah kertas undi yang ditolak dan 453 kertas undi yang dikeluarkan kepada pengundi tetapi tidak dimasukkan ke dalam peti undi.

Ketua Tempat Mengundi Responden Ketiga tersebut bagaimanapun hanya merekodkan hanya 453 sahaja jumlah kertas undi yang diambilkira atau yang patut berada di dalam peti undi di tempat mengundi saluran 4 tersebut.

Berdasarkan hal tersebut Borang 14 tersebut adalah satu penyata palsu dan penyata palsu tersebut telah menyebabkan wujud keraguan yang munasabah terhadap keseluruhan 453 kertas undi di saluran tersebut.

(iv) Pada 5.5.2013, Ketua Tern pat Mengundi Responden Ketiga di Tempat Mengundi Saluran 4, Pusat Mengundi Segil, Kod Daerah Mengundi 144/09/03, Bahagian Pilihan Raya N 09 Gambir, dalam memperakui sesalinan Penyata Pengundian Selepas Pengiraan Undi (Borang 14) di pusat mengundi tersebut telah membuat penyata bahawa terdapat sebanyak 487 jumlah undian oleh pemilih dan 12 jumlah kertas undi yang ditolak dan 100 kertas undi yang dikeluarkan kepada pengundi tetapi tidak dimasukkan ke dalam peti undi.

Ketua Tempat Mengundi Responden Ketiga tersebut bagaimanapun hanya merekodkan hanya 499 sahaja jumlah kertas undi yang diambilkira atau yang patut berada di dalam peti undi di saluran 4 tersebut.

Berdasarkan hal tersebut Borang 14 tersebut adalah satu penyata palsu dan penyata palsu tersebut telah menyebabkan wujud keraguan yang munasabah terhadap keseluruhan 499 kertas undi di saluran tersebut.

(v) Penyata-penyata palsu yang dinyatakan diperenggan (i) hingga (iv) di atas telah mewujudkan keraguan yang munasabah terhadap *1,932* undi (566+414+453+499) dalam pilihan raya tersebut dan telah menyentuh keputusan pilihan raya tersebut.

(Emphasis added.)

[23] It is the submission of the respondents that the facts pleaded do not show how any act or omission on the part of the second and third respondents tantamount to falsification. It is further submitted by learned counsel for the respondents that in the petition the petitioner merely states the grounds of complaints that by certifying the total votes obtained by each candidate in Form 14 as required by reg 25(12)(b) of the ECER the said presiding officer has reasonable cause to believe that such statements were false. The petition (paras 4–6) alleges that there were false entries in Form 14 as follows:

(a) errors in entering in item A of Form 14;

(b) omissions to enter figures in item A of Form 14; and

(c) miscalculations of the total number of votes by electors in item B of Form 14.

[24] It is necessary here to reproduce the prescribed Form 14:

STATEMENT OF THE POLL AFTER COUNTING THE BALLOTS

Situation of Polling Centre ..... Polling Station No (Stream) .....

Polling District Code No .....

Constituency of .....

A– Total number of ballot papers to be accounted for in the ballot box (as in E in Form 13) .....

B– Number of votes by electors for each contesting candidate:

Name of candidate (Spelling and arrangement of candidate's name SHALL BE THE SAME as printed on the ballot paper)	Name of Political Party/ Independent	Number
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Number of votes by electors _____

C– Number of rejected ballot papers (after doubtful ballot decided pursuant to subregulations 25(6) and (7) .....

D– Total number of ballot papers issued to voters but not put in the ballot boxes (A-B-C) .....

I certify that the above statement is correct.

.....

Signature

Dated .....

.....

Name of Presiding Officer

Name of Candidate or Election Agent or Counting Agent	I/C No.	Party/Independent	Signature

[25] It is the contention of the petitioner that the false statement raises a reasonable doubt over the figures stated in item A which are the total ballot papers accounted for in the ballot box. Accordingly it is submitted by the petitioner that any other facts would then be evidence.

[26] Regulation 25(12) of the ECER reads as follows:

A (12) Subject to subregulation (13), the presiding officer shall, immediately after the completion of the counting of the votes:

(a) announce to every candidate or his election agent or counting agent who is present the number of votes given to each candidate;

B (b) prepare a sufficient number of copies of the statement of the poll in Form 14 in the First Schedule, which shall be certified by the presiding officer and signed by each candidate or his election agent or counting agent who is present and who desires to sign the statement of the poll, as follows:

C (i) one copy, for the returning officer, shall be enclosed in a special envelope supplied for the purpose, affixed with a security tape which shall be signed by the presiding officer; and

(ii) one copy shall be delivered to each of the candidates or his election agent or counting agent as attend;

D (c) inform the returning officer, by any means available to him, of the result of the counting of votes at his polling station.

[27] The presiding officer is required under reg 25(12) of the aforesaid Regulations to do the following:

E (a) announce to every candidate or his election agent or counting agent present the numbers of votes for each candidate;

(b) prepare a sufficient number of copies of the Form 14 as prescribed under the First Schedule certified by him; *and*

F (c) signed by each candidate or his election agent or counting agent who is present and who desires to sign the statement of the poll.

[28] The petitioner however did not specify how the dispute in relation to the figure in item A of Form 14 relates to the fact that the presiding officer has made a false statement in relation to the total votes as stated in item B of the same Form. Neither did the petitioner state the false information and/or figures and/or calculations that were relied upon and certified by the presiding officer. A petition must not only narrate the facts complained of but must also relate or associate the complaints with the provision of election laws alleged to have been transgressed. This nexus is paramount as it forms the heart of any petition that hopes to see the light of day (re: *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729). A petitioner must therefore plead in the petition itself such material facts with such particulars where necessary to show on the face of the petition that he has a cause to complain under one of the five provisions of s 32 of the EOA before the petition can be examined on its merits at a full hearing.

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[29] I do not accept the arguments of learned counsel for the petitioner that they have disclosed the material facts and that any other facts would be evidence.

[30] Rule 5 of the EPR provides that:

> Evidence not to be stated in petition but particulars may be ordered. Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered.

[31] The next inevitable question that comes to mind is 'what is material facts'? In *Patau Rubis v Patrick Uren & Anor* [1984] 1 CLJ 51, Charles Ho elucidated the meaning of 'material facts' in an election petition and Ray J's dicta in *Hardwari Lal v Kanwal Singh* AIR 1972 SC 520 SC at p 520:

> Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared could the court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegations in the petition did not disclose any cause of action.

[32] His Lordship then concluded:

> The courts in India also explained in other cases the words 'material facts' to mean what is necessary for the purpose of formulating a complete cause of action and the failure to plead which would render the pleading to be struck out under the rules of pleadings (see *Keshav Prasad v AD Mani* [1961] DEC 133 (MPHC); *HV Kamath v Election Tribunal* AIR 1958 MP 168).

[33] The Federal Court in *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin Raja bin Hj Omar & Ors* [2009] 3 MLJ 589; [2009] 1 LNS 129 said:

> The use of the word 'shall' in the rules means that the requirements of the two rules are mandatory. The extent to which the facts and grounds relied upon must be set out in a petition is explained by the use of the words 'briefly' in *r 4(1)(b)* and 'concise' in *r 4(4)(3)*. The word 'briefly' is the adverb of 'brief' which is defined in Webster's New World Dictionary as, inter alia:
>
> > 'a concise statement of the main points of a law case, usually filed by counsel for the information of the court',
> >
> > And the word 'concise' as:
> >
> > 'brief and to the point; short and clear. Concise implies the stating of much in few words, by removing all superfluous or expanded details'.

[34] I am of the view that the petitioner failed to state the material facts and grounds with regards to the purported falsification of the numbers of votes and the Form 14 to sustain the prayers sought. The Federal Court in *Wan Sagar Wan Embong v Harun Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 per Zulkefli bin Ahmad Makinuddin FCJ at p 485 (MLJ); p 470 (CLJ) which reads:

> On the issue of whether the facts and grounds necessary to sustain the petition have properly and adequately been pleaded by the appellant, we are of the view that the learned election judge had made correct conclusions and in line with a long list of authorities, including the decision of the Federal Court in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 which states that under the EPR it is a mandatory requirement that a petition must not only state the facts but also the grounds to sustain the prayer and failure to do so renders the petition defective.

[35] This petition failed to state with clarity the facts and grounds relied on to sustain the prayer and is therefore defective. The Federal Court in the case of *Gan Joon Zin* affirmed the decision of the learned High Court judge that r 4(1)(b) of the EPR '... is a mandatory requirement that a petition must state not only the facts but also the grounds relied on to sustain the prayer. Failure to do so would render the petition defective'.

[36] The Federal Court in *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor; Daud bin Wan Jusoh v Anwar bin Haji Musa & Anor; Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1988] 2 MLJ 384; [1987] 1 LNS 68 held:

> ... a petitioner who is desirous of challenging the election of a successful candidate must first of all be able to show the court that he has a right to be heard under any or all of the five situations enumerated under s 32. The format and essential contents of the petition which he is required to conform with are prescribed under r 4. Paragraph (b) of sub-r (1) of that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. This requirement is further repeated under para 3 of the specimen form shown in sub-r (4). A petition under r 4 therefore must not only narrate the facts complained of but must relate or associate the complaints with the provision of the election laws the respondent is alleged to have transgressed. For instance, if the petitioner's complaint is on the irregularity in counting votes, he must factually account for the incident and then he has to state briefly why the act complained of is irregular? in the instant illustration, probably transgression of reg 25 of the Election (Conduct of Election) Regulations 1981. The consequential issue raised by the respondents is that non-compliance with the rule will lead to the dismissal of the petition ...

[37] Learned counsel for the petitioner in his submission stated that an election that was conducted not in accordance with laws gave rise to an important issue of fundamental rights – ie the fundamental rights of the voters who had voted. These fundamental rights are enshrined in the Federal Constitution and form an integral part of democracy. He further submitted

that if a voter was denied his right to vote, this would make the whole conduct of an election defective and fatal. However, this is not what the petitioner pleaded in the petition. What has been pleaded is a non-compliance of a written law and falsification. It is not clear at all in the petition what the charge relates to ie whether the figures are false, the statement according to the prescribed Form 14 are false etc.

[38] Merely stating the figures and setting out mathematically the calculations of the votes is insufficient to show that the statements in Form 14 is false. The failure to plead the material facts is a fundamental flaw in the petition as the petition lacks the most material essential facts. Furthermore, the written law as envisaged under s 32(b) of the EOA are laws relating to the conduct of elections. The specific laws in relation to the conduct of election are the Elections (Conduct of Elections) Regulations 1981 and the Elections (Postal Voting) Regulations 2003. Therefore the arguments of learned counsel for the petitioner that an election can be avoided based on an offence under s 4(a) of the EOA is untenable and cannot be sustained in law.

[39] Therefore I conclude that the petitioner has not complied with the requirement of rr 4(1)(b) and 4(4) of the EPR.

3. The petitioner has failed to comply with the mandatory provisions of rr 4(1) (b) and 4(4) of the EPR. The facts pleaded are insufficient to sustain the prayer that the alleged non-compliances have affected the result of the election

[40] It is the submission of learned federal counsel that the facts pleaded by the petitioner even if it is clear and concise would not be capable of affecting the results of the election. The petitioner seems to be disputing the total number of ballot papers to be accounted for in the ballot box but there is no substantial dispute as to the number of votes by the electors for each contesting candidate. The facts pleaded are insufficient to sustain the prayer that the alleged non compliance has affected the result of the election.

[41] A petitioner in an election petition must strictly adhered to and comply with all the requirements of the election laws. Justice Azahar Mohamad in the case of *Mohd Zaid Ibrahim* explained the reason why it is essential for the petition to set out the material facts and give sufficient particulars:

> A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the sine qua non of the right of hearing (see *Administrative Law of Malaysia and Singapore* (3rd Ed) by Professor MP Jain at p 291). ...

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> It is for these reasons that election court insists upon a strict compliance of the election laws in order for the respondent to know the nature of the allegations so as to enable him to prepare his case. In this way, he might marshal his facts and preserve his evidence in anticipation of a judicial hearing ... .

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[42] The Federal Court in *Wan Sagar bin Wan Embong v Mohamed Hj Ali & Ors* [1988] 2 MLJ 384 held:

> It is now settled law in Malaysia that if a petitioner pleads infringement of s 32(b) of the EOA he must provide facts and grounds to show that a non-compliance with the provisions of any written law relating to the conduct of an election 'affected the result of the election'.

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[43] In *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya Zainal Abidin bin Azim & Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237 it was held by the Federal Court:

D

> The two limbs in s 32(b) of the EOA are to be read conjunctively and not disjunctively. Section 32(b) of the EOA is very clear. The onus is on a petitioner to prove to the satisfaction of the election judge that there was non-compliance with the provisions of any written law relating to an election and that such non-compliance affected the result of the election. The English approach as illustrated in the case of *Morgan v Simpson* [1974] 3 All ER 722 should not be applied in Malaysia as s 32(b) of the EOA – on which the appellant's petition was based – is crystal clear in its language. To accept the English approach (interpretation) would defeat Parliament's intention in enacting s 32(b). (pp 245 d, 247 a & 250 b).

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[44] The petitioner is therefore required to plead in the petition such material facts with such particulars where necessary to show on the face of the petition that he had cause to complain under one of the five provisions of s 32 of the EOA before his case can be examined on the merit at a full hearing. A petition must not only narrate the facts complained of but must also relate or associate the complaints with the provision of election laws alleged to have been transgressed. In determining the results of an election the material figures would be the number of votes for each candidate. This petition however embarks on a mathematical journey without any specific point of destination. I am of the view that the facts pleaded are insufficient to sustain the prayer that the alleged non-compliance has affected the result of the election.

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CONCLUSION

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[45] In conclusion the petitioner has failed to comply with the requirements of the EPR as the facts and the grounds pleaded do not support the relief sought. Based on all the previous mentioned reasons, I see no alternative but to find that the second and third respondents' preliminary objection relating to rr 4(1)(b) and 4(4) of the EPR are sufficient to strike out the petition with

costs. After hearing the submission on cost by all parties it is hereby ordered cost of RM25,000 for each respondents.

[46] In accordance with s 36(1) of the EOA I declare that the first respondent was duly elected as the Member of the State Legislative Assembly for Gambir State Constituency of N09.

Petition struck out and first respondent declared as the duly elected candidate for the Gambir State Constituency.

Reported by Ashok Kumar